

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOANNE EILEEN BRACHT,	)	
	)	No. CV-10-00316-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 15.) Attorney Jeffrey Schwab represents Joanne Bracht (Plaintiff); Special Assistant United States Attorney Nancy A. Mishalanie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, **IT IS ORDERED** Plaintiff's Motion for Summary Judgment is **GRANTED**, and the matter is reversed and remanded to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on February 1, 2007. (Tr. 18; 117.) She alleged disability due to arthritis, asthma, depression, insomnia, and disabling elbow pain. (Tr. 138.) She claimed an onset date of June 1, 2006. (Tr. 138.) Her claim was denied initially and on reconsideration. (Tr. 79-81; 84-85.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on August 6, 2009, before ALJ Louis J. Volz,

1 III. (Tr. 27-57.) At the hearing, vocational expert John Yent  
2 testified. (Tr. 50-55.) The ALJ denied benefits on September 22,  
3 2009, and the Appeals Council denied review. (Tr. 1-3; 18-26.) The  
4 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

5 **STATEMENT OF THE CASE**

6 The facts of the case are set forth in detail in the transcript  
7 of proceedings and are briefly summarized here. At the time of the  
8 hearing, Plaintiff was 53 years old with a high-school education and  
9 one year of college. (Tr. 148; 298.) Plaintiff has past work  
10 experience as an accounts receivable clerk, government clerk, legal  
11 assistant, office assistant, retail sales associate, school  
12 secretary and typist. (Tr. 120.)

13 Plaintiff lives in a house with her husband and one child.  
14 (Tr. 36-38.) Plaintiff testified that on May 28, 2006, while at  
15 work she tripped, and as a result, she suffered severe neck pain.  
16 (Tr. 33.) About the same time, she experienced frequent, severe  
17 asthma attacks. (Tr. 40-41; 139.) She reported that she "missed a  
18 lot of work due to asthma and [her] neck problem" and she was  
19 ultimately fired. (Tr. 139.) Plaintiff's daily activities include  
20 light household cleaning, light grocery shopping, working on the  
21 computer, walking up to two miles, and swimming in her pool. (Tr.  
22 36-40.) Plaintiff testified that her asthma prevents her from going  
23 outside when her neighbors are burning wood in their fireplaces,  
24 when an inversion is present, or when traffic presents significant  
25 carbon monoxide. (Tr. 36; 40-41.) She occasionally works as a  
26 substitute office secretary for the school district. (Tr. 41.)

27 **ADMINISTRATIVE DECISION**

28 ALJ Louis J. Volz, III, found Plaintiff's date of last insured

1 for DIB purposes was December 31, 2011. (Tr. 18.) At step one, the  
2 ALJ found Plaintiff had not engaged in substantial gainful activity  
3 since June 1, 2006, the alleged onset date. (Tr. 20.) At step  
4 two, he found Plaintiff had severe impairments of (1) lumbosacral  
5 and lumbar strain; (2) asthma; (3) right-hand dominant, status-post  
6 right upper extremities surgeries; and (4) osteoarthritis of the  
7 right upper extremities. (Tr. 20.) The ALJ determined at step three  
8 Plaintiff's medically determinable impairments, alone and in  
9 combination, did not meet or medically equal one of the listed  
10 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4  
11 (Listings). (Tr. 20-21.) The ALJ found Plaintiff's subjective  
12 complaints regarding functional limitations were not fully credible.  
13 (Tr. 22-23.) At step four, he determined Plaintiff had the  
14 residual functional capacity to perform medium work as defined in 20  
15 C.F.R. § 404.1567(c), except she has occasional manipulation limits.  
16 (Tr. 21.) As a result, the ALJ concluded that Plaintiff is capable  
17 of performing her past relevant work because that work consisted of  
18 sedentary and light work. (Tr. 24.) The ALJ found that in addition  
19 to past relevant work and considering Plaintiff's age, education,  
20 and work experience, Plaintiff could also perform other jobs that  
21 exist in significant numbers in the national economy such as  
22 telemarketer, information clerk, and dispatcher. (Tr. 24-25.) The  
23 ALJ ultimately found Plaintiff was not disabled from June 1, 2006,  
24 through the date of his decision (September 22, 2009). (Tr. 25.)

#### 25 STANDARD OF REVIEW

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
27 court set out the standard of review:

28 A district court's order upholding the Commissioner's

1 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
2 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
3 Commissioner may be reversed only if it is not supported  
4 by substantial evidence or if it is based on legal error.  
5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
6 Substantial evidence is defined as being more than a mere  
7 scintilla, but less than a preponderance. *Id.* at 1098.  
8 Put another way, substantial evidence is such relevant  
evidence as a reasonable mind might accept as adequate to  
support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

9 The ALJ is responsible for determining credibility,  
10 resolving conflicts in medical testimony, and resolving  
11 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
12 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

13 It is the role of the trier of fact, not this court, to resolve  
14 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
15 supports more than one rational interpretation, the court may not  
16 substitute its judgment for that of the Commissioner. *Tackett*, 180  
17 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
18 Nevertheless, a decision supported by substantial evidence will  
19 still be set aside if the proper legal standards were not applied in  
20 weighing the evidence and making the decision. *Browner v. Secretary*  
21 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
22 substantial evidence exists to support the administrative findings,  
23 or if conflicting evidence exists that will support a finding of  
24 either disability or non-disability, the finding of the Commissioner  
25 is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
26 1987).

#### 27 SEQUENTIAL EVALUATION PROCESS

28 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the

1 requirements necessary to establish disability:

2 Under the Social Security Act, individuals who are  
3 "under a disability" are eligible to receive benefits. 42  
4 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
5 medically determinable physical or mental impairment"  
6 which prevents one from engaging "in any substantial  
7 gainful activity" and is expected to result in death or  
8 last "for a continuous period of not less than 12 months."  
9 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
10 from "anatomical, physiological, or psychological  
11 abnormalities which are demonstrable by medically  
12 acceptable clinical and laboratory diagnostic techniques."  
13 42 U.S.C. § 423(d)(3). The Act also provides that a  
14 claimant will be eligible for benefits only if his  
15 impairments "are of such severity that he is not only  
16 unable to do his previous work but cannot, considering his  
17 age, education and work experience, engage in any other  
18 kind of substantial gainful work which exists in the  
19 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
20 the definition of disability consists of both medical and  
21 vocational components.

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled. 20  
24 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
25 137, 140-42 (1987). In steps one through four, the burden of proof  
26 rests upon the claimant to establish a prima facie case of  
27 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
28 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
establishes that a medically determinable physical or mental  
impairment prevents her from engaging in her previous occupation.  
20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the  
presentation of 'complete and detailed objective medical reports of  
his condition from licensed medical professionals.'" *Meanel v.*  
*Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999).

26 If a claimant cannot do past relevant work, the ALJ proceeds to  
27 step five, and the burden shifts to the Commissioner to show that  
28 (1) the claimant can make an adjustment to other work; and (2)

1 specific jobs exist in the national economy which claimant can  
2 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*  
3 *Heckler*, 722 F.2d 1496, 1497-98 (9<sup>th</sup> Cir. 1984).

#### 4 ISSUES

5 The question is whether the ALJ's decision is supported by  
6 substantial evidence and free of legal error. Plaintiff argues the  
7 ALJ erred by (1) establishing an Residual Functional Capacity ("RFC")  
8 that was not supported by substantial evidence; (2) proposing a  
9 flawed hypothetical; and (3) finding Plaintiff not credible. (ECF  
10 No. 14 at 4-9.) Defendant contends the ALJ's decision is supported  
11 by substantial evidence and free of legal error. (ECF No. 16.)

#### 12 1. The RFC.

13 Plaintiff argues that the ALJ's RFC of medium duty work is not  
14 supported by substantial evidence. Specifically, Plaintiff argues  
15 that the RFC is supported by only two reviewing physicians' DDS  
16 reports - one dated April 18, 2007, and one dated May 30, 2007.  
17 (ECF No. 14 at 4.) Plaintiff contends that the DDS reports are  
18 based upon an incomplete understanding of Plaintiff's physical  
19 impairments.

20 In general, opinions from non-examining medical sources are  
21 given less weight than treating or examining doctors. *Lester v.*  
22 *Chater*, 81 F.3d 821, 831, (9<sup>th</sup> Cir. 1995). An ALJ must evaluate the  
23 opinion of a non-examining source and explain the weight given to  
24 it. Social Security Ruling ("SSR") 96-6p. Although an ALJ  
25 generally gives more weight to an examining doctor's opinion than to  
26 a non-examining doctor's opinion, a non-examining doctor's opinion  
27 may nonetheless constitute substantial evidence if it is consistent  
28 with other independent evidence in the record. *Thomas v. Barnhart*,

1 278 F.3d 947, 957 (9th Cir. 2002); *Orn v. Astrue*, 495 F.3d 625,  
2 632-33 (9<sup>th</sup> Cir. 2007). In this case, the reviewing doctors'  
3 conclusions regarding Plaintiff's disability are not consistent with  
4 the other independent evidence in the record.

5 Prior to spring of 2007, medical reports related to Plaintiff's  
6 elbow condition were scarce. While she initially complained of  
7 elbow pain, the majority of Plaintiff's pain complaints were related  
8 to her fall at work and involved her neck and back, and occasionally  
9 her feet. (Tr. 185; 191-92; 196-210; 245; 248; 253.) A September  
10 2006 nuclear medicine full body scan revealed Plaintiff's  
11 extremities were within normal limits. (Tr. 218.) However,  
12 beginning in the fall of 2006, Plaintiff began experiencing  
13 increasing problems with her right elbow. Neurologist Craig M.  
14 Garver, M.D., noted that Plaintiff reported she had three surgeries  
15 on her right arm, and she continued to experience decreased range of  
16 motion, rotation and "some discomfort with elbow pain. That is  
17 longstanding." (Tr. 215.) Dr. Garver noted that on exam, Plaintiff  
18 could not fully extend or pronate her right arm. (Tr. 216.) He  
19 described Plaintiff's condition:

20 [U]lnar distribution paresthesias, more prominent left  
21 than right. Exam is normal with the exception of give-way  
22 weakness due to pain on the right. There is some scar  
23 tissue there and I am unable to straighten the arm, and  
24 anatomy has been altered by the excision of the radial  
25 head.

26 (Tr. 217.) Dr. Garver ordered nerve conduction studies.<sup>1</sup> (Tr. 217.)

27 <sup>1</sup>It is not clear from this record if these studies were  
28 performed, because nerve conduction studies were not included in the  
administrative record.

1 On January 3, 2007, Lowell C. Allred, M.D., examined Plaintiff  
2 and noted, "Supination and pronation are also minimal on the right,  
3 normal on the left. Strength in the deltoid and upper arms  
4 bilaterally is 4+, right forearm and hand strength are diminished  
5 compared to the left side which is normal." (Tr. 246.) In his  
6 diagnosis, Dr. Allred commented that Plaintiff had a history with  
7 right elbow problems, and her surgeries had a "fair to poor  
8 outcome." (Tr. 246.)

9 On March 13, 2008, Edgar Hoover, M.D., examined Plaintiff and  
10 ordered x-rays of Plaintiff's elbow. (Tr. 293.) The x-rays  
11 revealed Plaintiff had a significant, old trauma to the elbow:

12 Smoothly marginated bone fragments are present in the  
13 region of the coronoid process and the olecranon. The  
14 radial head is deformed. There are degenerative changes  
15 at the radial capitellar and ulnar trochlear  
16 articulations. All these findings could be the result of  
17 old trauma. I do not see evidence of acute fracture or  
18 dislocation.

19 (Tr. 293.) On March 26, 2008, Dr. Hoover commented that the x-ray  
20 revealed "quite a lot of degenerative changes and evidence of old  
21 fractures," but he saw "nothing acute." (Tr. 294.) On August 11,  
22 2008, radiologist David Kim took new x-rays of Plaintiff's right  
23 elbow and opined that Plaintiff suffered from "severe osteoarthritis  
24 in the right elbow...." (Tr. 297.) Leona Hays, Orthopedic ARNP,  
25 compared the March and August 2008 films and noted that Plaintiff's  
26 right arm showed "severe degenerative changes with bone-on-bone  
27 appearance, cystic changes. She has [] evidence of perhaps even  
28 some loose bodies and a fragment off the olecranon that looks to be  
due to an old avulsion injury." (Tr. 298.) Ms. Hays noted that old  
nerve conduction studies from 2004 were interpreted as "normal  
indicating no neuropathy." (Tr. 298.) Ms. Hays diagnosed Plaintiff



1 with "advanced right elbow degenerative joint disease with  
2 dysfunction" and "possible ulnar nerve entrapment...." (Tr. 298.)  
3 Nerve conduction studies were again ordered.<sup>2</sup> (Tr. 299.)

4 In sum, considerable independent medical evidence exists that  
5 Plaintiff suffers from a severe impairment in her right elbow. The  
6 ALJ erred when he gave primacy to the opinions of non-treating,  
7 non-examining medical consultants, Charles Wolfe, M.D., and Harris  
8 Faigel, M.D., because their conclusions fail to address Plaintiff's  
9 elbow impairment and, thus, are inconsistent with the medical  
10 evidence from Plaintiff's treating physicians.

11 Further, the ALJ failed to address Ms. Hayes' opinion or  
12 diagnosis. The Commissioner argues that Ms. Hayes is not an  
13 acceptable medical source and, thus, not qualified to provide a  
14 medical opinion. (ECF No. 16 at n.2.) In evaluating a disability  
15 claim, the ALJ must consider evidence from medical sources. 20  
16 C.F.R. §§ 404.1512, 416.912. Only "acceptable medical sources" such  
17 as physicians and psychologists may establish an impairment. 20  
18 C.F.R. §§ 404.1513, 416.913. The ALJ is also required to consider  
19 evidence from sources which are not acceptable medical sources. 20  
20 C.F.R. §§ 404.1513(d), 416.913(d); S.S.R. 06-3p. "Other sources"  
21 include nurse practitioners, physician assistants, therapists,  
22 teachers, social workers, spouses and other non-medical sources. 20  
23 C.F.R. §§ 404.1513(d), 416.913(d). The opinion of an acceptable  
24 medical source is given more weight than that of an "other source."  
25 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71

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26  
27 <sup>2</sup>No corresponding record of a nerve conduction study was  
28 included in the administrative record.

1 (9th Cir. 1996). However, the ALJ is required to "consider  
2 observations by non-medical sources as to how an impairment affects  
3 a claimant's ability to work." *Sprague v. Bowen*, 812 F.2d at 1232.  
4 Pursuant to *Dodrill v. Shalala*, 12 F.3d 915 919 (9th Cir. 1993). An  
5 ALJ is obligated to give reasons "germane" to such testimony before  
6 discounting it.

7 Ms. Hayes is a nurse practitioner and an "other source" under  
8 20 C.F.R. § 404.1513(d). The ALJ may, therefore, reject the opinion  
9 for germane reasons<sup>3</sup>. See *Dodrill*, 12 F.3d 919. Opinions of "other  
10 medical sources" may be given more weight than a treating physician  
11 if certain factors are present: "Each case must be adjudicated on  
12 its own merits based on a consideration of the probative value of  
13 the opinions and a weighing of all the evidence in that particular  
14

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15 <sup>3</sup>Also, when a nurse practitioner is "working closely with, and  
16 under the supervision of" a physician, the nurse practitioner's  
17 "opinion is to be considered that of an acceptable medical source."  
18 *Taylor v. Comm'n of Soc. Sec. Admin.*, 659 F.3d 1228 (9th Cir. 2011)  
19 (internal quotations omitted)(citing *Gomez*, 74 F.3d at 971 (nurse  
20 practitioner considered an acceptable medical source because she  
21 "worked closely under the supervision of [the physician] and . . .  
22 was acting as an agent of [the physician]"). In this case, Ms.  
23 Hayes' report contained the following notation: "co-approved by:  
24 9/17/2008 7:24:00 PM Daniel Canfield." (Tr. 299.) Dr. Canfield is  
25 an orthopedic surgeon. It is not clear from this record how closely  
26 Ms. Hayes worked with Dr. Canfield, but it is arguable that given  
27 Dr. Canfield's signature, Ms. Hayes' opinion should have been  
28 considered that of an acceptable medical source.

1 case." SSR 06-3p. For example, where the "other source" has seen  
2 the claimant more often and has provided better supporting evidence  
3 and a better explanation for his or her opinion, it may be  
4 appropriate for an ALJ to give greater weight to the "other source"  
5 opinion than to an acceptable medical source. *Id.*

6 Although the ALJ is not required to discuss every piece of  
7 evidence, the ALJ must explain why significant probative evidence  
8 was rejected. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir.  
9 1984). In this case, the ALJ erred by failing to provide a germane  
10 reason - or any reason - for rejecting the opinion of Ms. Hayes and  
11 Dr. Canfield, and instead by giving determinative weight to the two  
12 DDS reports. See *Lester*, 81 F.3d at 831 ("The opinion of a  
13 nonexamining physician cannot by itself constitute substantial  
14 evidence that justifies the rejection of the opinion of either an  
15 examining physician or a treating physician.").

## 16 **2. The Hypothetical.**

17 Plaintiff contends that the hypothetical was erroneous because  
18 it omitted Plaintiff's most serious impairments. (ECF No. 14 at 7.)  
19 The ALJ's initial hypothetical included "a residual functional  
20 capacity compatible with medium activity" along with the abilities  
21 to sit and stand/walk for at least six hours in an eight-hour  
22 workday, avoidance of concentrated exposure to fumes, odors, gasses,  
23 and poor ventilation. (Tr. 52.) Under this hypothetical, the VE  
24 opined that a worker could perform all of Plaintiff's past work.  
25 (Tr. 52.) The VE testified that if the hypothetical was modified  
26 to include bilateral, occasional manipulated limits, a worker would  
27 not be able to perform Plaintiff's past work. (Tr. 52.) Finally,  
28

1 when the hypothetical was modified to describe a worker who could  
2 frequently manipulate, instead of occasionally manipulate, the  
3 worker could perform all of Plaintiff's past work, along with other  
4 jobs. (Tr. 52-53.) The ALJ concluded that Plaintiff was capable of  
5 performing "medium work with occasional manipulation limits." (Tr.  
6 21.)

7 For the testimony of a VE to be considered reliable, the  
8 hypothetical must include all claimant's functional limitations,  
9 both physical and mental that are supported by the record. *Thomas*,  
10 278 F.3d at 955. Hypothetical questions posed to a VE need not  
11 include all alleged limitations, but rather only those limitations  
12 which the ALJ finds to exist. *See, e.g., Magallanes v. Sullivan*,  
13 981 F.2d 1016, 1019 (9th Cir. 1992); *Copeland v. Bowen*, 861 F.2d  
14 536, 540 (9th Cir. 1988). As a result, an ALJ must propose a  
15 hypothetical that is based on medical assumptions, supported by  
16 substantial evidence in the record, that reflects the claimant's  
17 limitations. *Osenbrock v. Apfel*, 240 F.3d 1157, 1163-64 (9th Cir.  
18 2001)(citing *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995));  
19 *see also Andrews*, 53 F.3d at 1043 (although the hypothetical may be  
20 based on evidence which is disputed, the assumptions in the  
21 hypothetical must be supported by the record).

22 In this case, the ALJ's hypothetical did not include all of  
23 Plaintiff's functional limitations, notably the limitations caused  
24 by her severe elbow impairment. The ALJ failed to consider this  
25 impairment, and it is unclear how Plaintiff's elbow condition would  
26 affect her residual functional capacity. As a result, the  
27 hypothetical was not supported by sufficient evidence.

1 **3. Credibility.**

2 Plaintiff argues that the ALJ erred in finding her pain  
3 complaints not credible because none of her treating doctors  
4 questioned the veracity of her pain complaints or her credibility.  
5 (ECF No. 14 at 7.) When the ALJ finds a claimant's statements as to  
6 the severity of impairments, pain, and limitations are not credible,  
7 the ALJ must make a credibility determination with findings  
8 sufficiently specific to permit the court to conclude the ALJ did  
9 not arbitrarily discredit claimant's allegations. *Thomas*, 278 F.3d  
10 at 958-959; *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir.  
11 1991) (en banc). If no affirmative evidence exists that the  
12 claimant is malingering, the ALJ must provide "clear and convincing"  
13 reasons for rejecting the claimant's allegations regarding the  
14 severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
15 1998). The ALJ engages in a two-step analysis in deciding whether  
16 to admit a claimant's subjective symptom testimony. *Smolen v.*  
17 *Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step,  
18 the ALJ must find the claimant has produced objective medical  
19 evidence of an underlying "impairment," and that the impairment, or  
20 combination of impairments, "could reasonably be expected to produce  
21 pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup>  
22 Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the  
23 credibility of the claimant.

24 In evaluating credibility, the ALJ may engage in ordinary  
25 techniques of credibility evaluation, including considering  
26 claimant's reputation for truthfulness and inconsistencies in  
27 claimant's testimony, or between claimant's testimony and conduct,  
28

1 claimant's daily activities, claimant's work record and testimony  
2 from physicians and third parties concerning the nature, severity  
3 and effect of the symptoms of which claimant complains. *Thomas*, 278  
4 F.3d at 958-59.

5 In this case, the ALJ focused on Petitioner's daily activities  
6 and inconsistencies in her testimony. If a claimant engages in  
7 numerous daily activities involving skills that could be transferred  
8 to the workplace, the ALJ may discredit the claimant's allegations  
9 upon making specific findings relating to those activities. See  
10 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); see also *Morgan*,  
11 169 F.3d at 600 (claimant's ability to fix meals, do laundry, work  
12 in the yard, and occasionally care for his friend's child was  
13 evidence of claimant's ability to work). The ALJ's findings relate  
14 to Plaintiff's activities involving her ability to stand and walk -  
15 i.e., walking up to two miles per day, swimming, play rehearsals,  
16 living in a third-floor bedroom, - were inconsistent with her  
17 claimed limitations. (Tr. 24; 36; 38-40; 42; 48-49; 255.) To the  
18 extent credibility findings related to Plaintiff's ability to walk  
19 and stand, the ALJ's findings are supported by the record.

20 However, the ALJ failed to consider Plaintiff's arm impairment,  
21 despite the objective medical evidence establishing the impairment  
22 and the finding that one of Plaintiff's severe impairments was  
23 osteoarthritis of the upper right extremities. (Tr. 20.) The  
24 Physical Residual Functional Capacity Assessment completed by  
25 Charles Wolfe, M.D., indicated that Plaintiff could occasionally  
26 lift and/or carry 50 pounds, frequently lift/carry 25 pounds, and  
27  
28

1 push/pull function was unlimited.<sup>4</sup> (Tr. 272.) Dr. Wolfe indicated  
2 Plaintiff had no manipulative limitations. (Tr. 274.) Harris  
3 Faigel, M.D., agreed with Dr. Wolfe's assessment. (Tr. 283-84.)  
4 The ALJ concluded Plaintiff's complaints were not credible, in light  
5 of her activities, but nearly all of Plaintiff's activities cited by  
6 the ALJ were related to her ability to stand/walk.<sup>5</sup> The ALJ  
7 asserted, "This conclusion that claimant can perform a limited range  
8 of medium work is confirmed by her admissions concerning her  
9 activities of daily living, as discussed above, as well as  
10 corroborated by the weight [of] the record evidence." (Tr. 23.)  
11 Contrary to the ALJ's assertion, the record is devoid of admissions  
12 from Plaintiff that are inconsistent with her claims about the  
13 severity of her right elbow impairment. Instead, Plaintiff's  
14 testimony supports her claims. For example, Plaintiff testified  
15 that she is no longer able to do the heavy household chores, such as  
16 cleaning the bathtub or polishing the oak table because she cannot  
17 apply enough pressure with her arms. Also, she cannot perform the  
18 sweeping, mopping, vacuuming, or window washing. (Tr. 38.) She  
19 stated that the vacuuming was too difficult and hurt her right arm.  
20 (Tr. 43.) The Plaintiff also testified that she can no longer stir  
21 cookie dough, lift heavy pots, and that unpredictably, her right

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23 <sup>4</sup>Medium work involves "lifting no more than 50 pounds at a time  
24 with frequent lifting or carrying of objects weighing up to 25  
25 pounds." 20 C.F.R. §§ 404.1567(c) and 416.967(c).

26 <sup>5</sup>The ALJ also cited "cutting out arts and crafts" and "computer  
27 work," which arguably could implicate the use of Plaintiff's elbow,  
28 but he failed to analyze or discuss these activities. (Tr. 21.)

1 hand will suddenly give out, causing her to drop any item in her  
2 hand. (Tr. 44; 46.) In August, 2008, Plaintiff rated her pain  
3 related to her elbow as seven on a scale of one to ten. (Tr. 298.)

4 Additionally, the weight of the medical evidence indicates that  
5 Plaintiff's mobility and strength are compromised by the condition  
6 of her right elbow. (Tr. 215-17; 246; 292-94; 297-99.) Thus,  
7 neither of the bases the ALJ relied upon in finding Plaintiff not  
8 credible is supported by the record.

9 **4. Remand**

10 The decision to remand to the Commissioner for further  
11 proceedings or simply to award benefits is within the discretion of  
12 the court. *Harman*, 211 F.3d at 1175-78; *McAllister v. Sullivan*, 888  
13 F.2d 599, 603 (9th Cir. 1989). "If additional proceedings can remedy  
14 defects in the original administrative proceedings, a social  
15 security case should be remanded. Where, however, a rehearing would  
16 simply delay receipt of benefits, reversal and an award of benefits  
17 is appropriate." *McAllister*, 888 F.2d at 603 (citation omitted); see  
18 also *Varney v. Secretary of Health & Human Serv.*, 859 F.2d 1396,  
19 1399 (9th Cir. 1988) ("Generally, we direct the award of benefits in  
20 cases where no useful purpose would be served by further  
21 administrative proceedings . . . or where the record has been  
22 thoroughly developed.").

23 Here, the court concludes that the errors identified above can  
24 be remedied with further proceedings. On remand, the ALJ should  
25 address these errors by properly evaluating the medical evidence,  
26 including the opinions of Plaintiff's treating providers. Remand  
27 also is appropriate to allow the ALJ to consider properly the  
28



1 Plaintiff's subjective complaints and to incorporate such  
2 consideration in evaluating the medical record and Plaintiff's  
3 functional limitations.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, this court  
6 concludes the ALJ's decision is not supported by substantial  
7 evidence and is based on legal error. Remand consistent with this  
8 decision is necessary. Upon remand, the ALJ shall reconsider the  
9 opinion of Ms. Hayes and Dr. Canfield, and shall consider the entire  
10 record. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
13 **GRANTED**. The matter is remanded to the Commissioner for additional  
14 proceedings pursuant to sentence four 42 U.S.C. § 405(g).

15 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is  
16 **DENIED**.

17 The District Court Executive is directed to file this Order and  
18 provide a copy to counsel for Plaintiff and Defendant. Judgment  
19 shall be entered for **Plaintiff** and the file shall be **CLOSED**.

20 DATED February 6, 2012.

21  
22 S/ CYNTHIA IMBROGNO  
23 UNITED STATES MAGISTRATE JUDGE  
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